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SUPREME COURT OF THE UNITED STATES

IN THE

OCTOBER TERM, 1974

NO. 74-695

BOONE DESKINS .....PETITIONER

VS:

COMMONWEALTH OF KENTUCKY .....RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion below from the Kentucky Court of Appeals is styled *Boone Deskins* v. *Commonwealth of Kentucky*, reported at 512 S.W. 2d 520 (1974).

JURISDICTION

Petitioner's application to invoke the jurisdiction of this Court should be denied because it fails to meet the jurisdictional requirements of 28 U.S.C. § 1257 (3). the proper provision for review of a state court judgment in a criminal case on certiorari.

The question the petitioner attempts to present here under the Fourteenth Amendment of the Constitution of the United States has never been properly presented to

or decided by the courts of Kentucky so as to give this Court jurisdiction to review the judgment on writ of certiorari.

In *Columbia Water Power Co.* v. *Columbia Electric R.L.&P. Co.*, 172 U.S. 475, 43 L.ed 521, 19 S.Ct. 247 (1898), this Court in discussing jurisdictional requirements stated:

> "There is no doubt that under the third class the Federal right, title, privilege, or immunity *must be*, with possibly some rare exceptions, *specifically set up or claimed* to give this court jurisdiction." (Emphasis added.)

Rule 23-1(f) of the rules of this Court provides in part:

> *"If review of the judgment of a state court is sought,* the statement of the case shall also specify *the stage in the proceedings in the cour. of first instance and in the appellate court,* at which, and *the manner in which,* the federal questions sought to be reviewed were raised; *the method of raising them* (e. g., by a pleading, by request to charge and exceptions, by assignment of error); *and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record,* or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portions of the court's charge and exception thereto, assignment of errors) *as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review*

> *the judgment on writ of certiorari.*' (Emphasis added.)

A review of the record of the state court proceedings in the instant case shows that petitioner did not specifically set up or raise a federal question with the required particularity so as to bring such question to the attention of the state courts. In *Oxley Stave Co.* v. *Butler County*, 166 U.S. 648, 655, 41 L.ed 1149, 17 S.Ct 1003 (1896), this Court said:

> ". . . the jurisdiction of this court to re-examine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right."

In raising the federal question, it is necessary that the question be presented in the state courts in such a manner that there is no doubt that reliance is upon federal rights rather than state rights. See *New York Central & Hudson River Railroad Co.* v. *New York*, 186 U.S. 269, 273, 46 L.ed 1158, 22 S.Ct. 916 (1901).

The fact that petitioner cited a United States Supreme Court case in his briefs to the state court is neither sufficient to raise a federal question nor sufficient to establish jurisdiction. Jurisdiction cannot be founded by surmise. *Lynch v. New York ex rel Pierson*, 239 U.S. 52, 54, 79 L.ed 191, 55 S.Ct. 16 (1934). This application for writ of certiorari should be denied, because petitioner failed to set out or raise a federal question with sufficient

definiteness so as to bring such question to the attention of the state courts.

Even if petitioner could be said to have raised a federal question by intendment, it would be of no consequence in the present case. The decision of the state court was based upon a nonfederal ground, i.e., on state law; and this Court, in *Murdock v. Memphis,* 20 Wall 590, 22 L.ed 429 (1875), stated that it would not review a state court judgment if there is an adequate and independent state ground which supports the decision of the state courts.

As this Court stated in *Durley v. Mayo,* 351 U.S 277, 100 L.ed 1178, 76 S.Ct. 806:

> "It is a well established principle of this Court that before we will review a decision of a state court it must affirmatively appear from the record that the federal question was presented to the highest court of the state having jurisdiction and that its decision of the federal question was necessary to its determination of the cause . . . And where the decision of the state court might have been either on a state ground or on a federal ground and the state ground is sufficient to sustain the judgment, the court will not undertake to review it."

The Kentucky Court of Appeals concluded, based upon a finding of fact that the petitioner's attorneys were aware of the meetings between Deskins and Davidson, and upon substantial state grounds, that the petitioner was not denied a fair trial.

Notwithstanding that petitioner had properly raised

in the state courts the question he presents here, the Court should decline to review because the judgment of this case was reached upon a nonfederal ground which independently and adequately supports the decision reached by the state court. Thus, determination of the question that petitioner brings here was unnecessary by the state court in its decision of this case.

For the foregoing reasons, respondent submits that petitioner's application for certiorari should be denied because it fails to meet jurisdictional requirements.

QUESTION PRESENTED

WHETHER THE KENTUCKY COURT OF APPEALS, BASED ON SUBSTANTIAL STATE GROUNDS, CORRECTLY DECIDED THAT PETITIONER WAS NOT DENIED A FAIR TRIAL BY THE ADMISSION OF SURREPTITIOUSLY RECORDED POST INDICTMENT CONVERSATIONS BETWEEN PETITIONER AND ANOTHER INDIVIDUAL.

STATEMENT OF THE CASE

Petitioner's statement of the case is substantially correct. Additional material facts and corrections will be set out in the respective arguments which follow.

ARGUMENT

THE KENTUCKY COURT OF APPEALS CORRECTLY DECIDED, BASED ON KENTUCKY LAW, THAT THE PETITIONER WAS NOT DENIED A FAIR TRIAL BY THE ADMISSION INTO EVIDENCE OF HIS SURREPTITIOUSLY RECORDED POST INDICTMENT STATEMENTS.

The petitioner herein contends that he was denied a

fair trial by the admission of statements made by him and surreptitiously recorded by law enforcement officers. This assertion is based primarily upon the case of *Massiah v. United States*, 377 U.S. 201. There are, however, in this instance, circumstances which place this case outside the rationale of *Massiah*.

In this case the petitioner, who was under indictment and represented by counsel, initiated a contract with a private individual and attempted to have this individual steal material from the Commonwealth's files and sell them to him. This individual, was not, at the time of the initial contact (and probably at no time), an agent of the Commonwealth. After the individual was contacted, instead of seeing fit to be dishonest and actually steal the Commonwealth's file, he contacted the proper law enforcement officers. Shortly after these contacts were initiated and after only two meetings between petitioner and Davidson, the Commonwealth went to the Court, in camera, set forth the circumstances, and obtained an order authorizing the electronic surveillance and recording of subsequent meetings between petitioner and Davidson.

The Kentucky Court of Appeals correctly decided, based on substantial state law that Davidson was not an agent of the Commonwealth and that the statements made by petitioner to him were admissible evidence. This ruling was correctly based upon the premise that it would be folly to hold that just because a defendant is under indictment and represented by counsel that he cannot have incriminating statements used against him when he seeks out an individual (who in this case was not even a government agent) and solicits his support in obstructing justice.

Based upon these circumstances, the Kentucky Court correctly decided that petitioner was not denied his right to counsel.

CONCLUSION

The petitioner has failed to properly meet the jurisdictional requirements or to present a substantial federal question necessary for the consideration of this Court. For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Ed W. Hancock, one of counsel for respondent, hereby certify that the foregoing Brief was served on petitioner by depositing three copies of same in the United States mail, first class postage prepaid, on December 27th, 1974, addressed to counsel for petitioner, Richard E. Vimont, Esquire, 139 Market Street, P. O. Box 2086, Lexington, Kentucky 40501.

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